February 11, 2008

Federal Trade Commission
Office of the Secretary
Room 159–H (Annex C)
600 Pennsylvania Avenue, NW.
Washington, DC 20580

Re: Procedures to Enhance the Accuracy and Integrity of Information Furnished to Consumer Reporting Agencies under Section 312 of the Fair and Accurate Credit Transactions Act, Project No. R611017

I. INTRODUCTION

DBA International ("DBA") is pleased to submit to the Federal Trade Commission ("FTC")[1] in connection with the above referenced notice of proposed rulemaking ("Proposed Rulemaking") implementing § 312 of the Fair and Accurate Credit Transactions Act of 2003 ("FACTA"). We recognize the work undertaken by the FTC and the federal financial regulatory agencies (collectively, the "Agencies") to develop the Proposed Rulemaking. DBA believes that the Proposed Rulemaking provides a solid foundation for implementing the requirements of FACTA § 312, but that the Agencies should consider revisions, such as those set forth below, to reduce the burdens imposed by the Proposed Rulemaking on data furnishers—particularly small and occasional furnishers—so as not to chill the furnishing of information to consumer reporting agencies; to ensure that furnishers have the greatest degree of flexibility possible to meet their obligations; to ensure that the interpretation of other Fair Credit Reporting Act ("FCRA) provisions is not impacted; and to provide a safe harbor for compliance with the Fair Debt Collections Practices Act ("FDCPA").

DBA, founded in 1997, is the trade association and self-regulatory body for the debt buying industry. DBA currently has 453 professional debt buyer member companies and 120 vendor and affiliate member companies. Debt buying and collecting is a closely and comprehensively regulated industry, and, in general, is subject to federal, state, and local laws.

[1] We understand that the FTC will share these comments with the other federal agencies participating in this rulemaking and, therefore, that it is not necessary for us to separately submit these comments to each participating agency. *See*, 72 Fed. Reg. 70944 (Dec. 13, 2007) ("Comments submitted to one or more of the Agencies will be made available to all of the Agencies."). Citations, for purposes of convenience, are made to the FTC version of the Proposed Rulemaking.

Importantly, DBA has adopted a code of ethics which, among other things, provides that its members must comply with the FDCPA, the FCRA, and any additional state laws which may be more stringent. DBA provides networking and educational opportunities for its members and facilitates the sharing of information among debt buyers with regard to the actions of Congress and state legislatures. Further, DBA provides a forum for debt buyers to exchange ideas and information. DBA offers guidance to its members on legal issues, including the FDCPA and other consumer-related and privacy related statutes through an annual convention, an executive conference, newsletters, and a web site.

II. COMMENTS

A. The Final Rule and Guidelines Should Provide As Much Flexibility to Data Furnishers as Possible, in Recognition of the Diversity of Data Furnishers and the Voluntary Nature of the Reporting System.

The Proposed Rulemaking appears to have been written with traditional institutional furnishers of information, such as banks, in mind. However, as the Agencies rightly noted in requesting comments on the Proposed Rulemaking,[2] there are many other types of data furnishers who furnish information to consumer reporting agencies. Given the voluntary nature of the reporting system, the final rule and guidelines should minimize the potential burden on data furnishers. Burdensome compliance programs will discourage furnishers, particularly small furnishers (such as smaller debt buyers) and those that furnish information occasionally rather than on a regular basis, from providing information to consumer reporting agencies. This, in turn, would limit the diversity of information in consumer reporting files and thereby reducing the utility of this information to creditors and other users of consumer reports.

DBA supports the approach the concept embodied in the Proposed Rulemaking of making a compliance program scaleable based on the "size, nature, scope, and complexity" of the furnisher's activities.[3] We recommend, however, that the Agencies take further steps to reduce the potential burdens imposed, particularly on small data furnishers and data furnishers that do not routinely furnish information to consumer reporting agencies the way that large creditors do. Changes that would reduce the potential burden on small and occasional furnishers include:

- Eliminate the requirement that every data furnisher have a *written* compliance program. The underlying, laudable, goal of FACTA § 312 is the accuracy and integrity of information furnished to consumer reporting agencies. A written compliance program is not essential to accomplishing that goal. Large institutional furnishers, particularly those that furnish information to consumer reporting agencies on a regular basis, likely will develop written compliance programs as a matter of course. Imposing such requirements on small or occasional data furnishers has the potential to be burdensome and to discourage the reporting of information to consumer reporting agencies, without enhancing the accuracy or integrity of the

[2] *See, e.g.*, 72 Fed. Reg. 70966.
[3] 16 C.F.R. § 660.3(a).

information furnished. We also note that FACTA § 312 does not require written policies and procedures.

- Provide furnishers with flexibility by emphasizing flexible guidelines rather than regulations. Section 312—codified as FCRA § 623(e)—requires the Agencies to issue "guidelines …regarding the accuracy and integrity of information" furnishers provide to consumer reporting agencies.[4] However, the regulatory authority of the Agencies is actually and should continue to be more limited, confined to requiring furnishers to "establish reasonable policies and procedures for implementing the guidelines."[5] We believe that this congressional mandate promotes flexibility; charging the Agencies with establishing *guidance,* which furnishers can then utilize in the formulation of their policies and procedures scalable to the size to the furnisher. Toward this end, to the extent the Agencies conclude that definitions of terms such as accuracy and integrity (discussed further below) are necessary, we recommend that these be instituted in the form guidance rather than regulations.

  Similarly, we recommend that any guidance emphasize that specific factors identified as guidance not be mandatory, but rather, the guidance issued be factors which a furnisher might consider to be appropriate to the furnisher's size, complexity, and other factors. We also recommend that flexibility also be promoted in the guidelines by formulating objectives and other guideline provisions in terms such as "reasonable procedures" rather than terms such as "ensure" which might be misconstrued as imposing an absolute, rather than flexible standard.[6]

B. The Final Regulations and Guidelines Should Be Drafted to Ensure that the Implementation and Operation of Other FCRA Provisions Are Not Affected.

The term "accuracy" has appeared in the FCRA since its original enactment in 1970. The FCRA uses the term "accuracy" (as well as terms such as "accurate" and "inaccurately") multiple times, in multiple provisions. Congress, however, has never found it necessary or desirable to define "accuracy" in the statute—perhaps in recognition of the difficulty and complexity of the task. As a result, the operation and interpretation of FCRA provisions that address accuracy issues have evolved primarily through case law, based on the facts in each particular case.

If the Agencies define the term "accuracy" in this Rulemaking, courts may look to that definition not only in the context of FCRA § 623(e), but also in the context of the many other FCRA provisions which use the term. Such a development could produce increased litigation under FCRA provisions subject to private rights of action and significantly unsettle decades of case law interpreting various FCRA requirements relating to accuracy in ways that neither the Agencies or those submitting comments on the Proposed Rulemaking can fully anticipate. As such, we question whether a definition of "accuracy" is necessary or desirable.

[4] FCRA § 623(e)(1)(A).
[5] FCRA § 623(e)(1)(B).
[6] *See, e.g.,* 16 C.F.R. Part 660, Appendix A Part I.

If, however, the Agencies believe that definitions are necessary and appropriate, we recommend that they be expressed in guidelines rather than in regulations. We also would recommend that the Agencies expressly provide that the definitions apply only in the context of § 623(e) and that the definitions have no operation or effect with respect to other FCRA provisions. If the term "integrity" is to be defined using one of the two approaches proposed by the Agencies, we suggest the "guidelines" definition should be adopted rather than the "regulatory" definition, as the guidelines approach is more reflective of factors in a furnisher's knowledge and control and also is more consistent with the voluntary nature of the reporting system.

Similarly, we note that FCRA § 623(b) already addresses the obligations of a furnisher in connection with the investigation of disputes received by the furnisher through a consumer reporting agency. Furnishers are required undertake steps such as: (1) conduct an investigation with respect to the disputed information; (2) review all relevant information provided by the consumer reporting agency; (3) report the results of the investigation to the consumer reporting agency; and (4) if the information is found to be incomplete or inaccurate, report the results to other consumer reporting agencies to which it originally provided the erroneous information. We recommend that the Agencies make it clear in the final regulations that nothing in the regulations and guidelines implementing FCRA § 623(e) is intended affect the operation or interpretation of § 623(b).

C. The Final Regulations and Guidelines Should Provide a Safe Harbor for Compliance with FDCPA Requirements.

As the Agencies recognized in the Proposed Rulemaking,[7] debt collectors have compliance obligations under the FDCPA, which could be implicated by the Proposed Rulemaking. These obligations regulate various aspects of a debt collector's interaction with consumers, including regulation of the circumstances under which a debt collector may contact consumers or whether the debt collector may contact the consumer at all.[8] Compliance with these FDCPA requirements may impact the manner in which a debt collector would comply with the requirements of the Proposed Rulemaking. Litigation already has occurred under FCRA § 623(b), which illustrates the need for a safe harbor. A court, for example, has held that it was for a jury to decide whether a debt collector's reinvestigation of a dispute was reasonable because, while the debt collector ordinarily would have contacted the consumer as part of its reinvestigation (something not required by the FCRA), the debt collector did not do so in this case because the consumer had exercised his FDCPA right to instruct the debt collector not to make contact.[9]

Debt collectors should not be whipsawed between FCRA and FDCPA requirements. To prevent such a possible outcome in connection with the Proposed Rulemaking, we request that the Agencies include a safe harbor in the final regulation providing that in the event of a conflict, a debt collector's compliance with FDCPA requirements shall also be deemed to be in compliance with the final regulations and guidelines and that compliance with the FDCPA and

[7] 72 Fed. Reg. 70966.
[8] *See, e.g.*, 15 U.S.C. § 1692c(c).
[9] *King v. Asset Acceptance, LLC*, 452 F.Supp.2d 1272 (N.D. Ga. 2006).

other legal requirements is a legitimate factor to consider in implementing a compliance program implementing the regulations and guidelines.

III. CONCLUSION

The DBA appreciates the opportunity to comment on the Proposed Rulemaking. DBA and our members recognize the importance of furnishing accurate information to consumer reporting agencies. We believe that the revisions to the Proposed Rulemaking, such as those described above will further the important goal of accurate data reporting, without creating burdens on data furnishers which ultimately could prompt them to refrain from furnishing information to consumer reporting agencies.

Respectfully submitted this 11th day of February, 2008.

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